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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN F. "DUFFY" CONLEY and
SHEILA F. SMITH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a search warrant authorizing seizure of all accounting records, all revenue records, all employee records and all evidence "indicative of a gambling operation" violates the particularity requirements of the Warrant Clause and is overbroad.

II. Whether the warrant affidavit provided a substantial basis for a finding of probable cause to enter and search the premises in question.

(a) Whether the court of appeals improperly defined the standard of review to be applied by the district court in reviewing the magistrate's initial probable cause determination.

III. Whether the good faith exception of *United States v. Leon*, 468 U.S. 897 (1984) would apply to save the search and seizure conducted under this warrant.

(a) Whether *Leon* should apply in evaluating the admissibility in federal court of evidence seized by State agents under a State warrant, where the State's highest court has declined to adopt the good faith exception, holding that the less rigorous procedures and practice under State law do not meet the fundamental premises of this Court's opinion in *Leon*.

LIST OF PARTIES

Petitioners John F. "Duffy" Conley and Sheila F. Smith are two of twenty-three defendants charged in a pending federal criminal prosecution docketed at No. 93-3095 in the United States District Court for the Western District of Pennsylvania.

The complete list of defendants in the underlying prosecution is as follows: John F. "Duffy" Conley; William C. Curtin; Sheila F. Smith; John Francis "Jack" Conley; Thomas "Bud" McGrath; Mark A. Abbott; Thomas Rossi; William Steinhart; Roberta Fleagle; Robin Spratt; Monica C. Kail; William J. Reed; Joanne T. Smith; Kenneth "Ron" Goodwin; Lawrence N. "Neudy" Demino, Sr.; Christopher "Chris" Kail; Joseph A. Devita; Frank Garofalo; Thomas D. Ciocco; Michael Sukaly; Phillip M. "Mike" Farrell; Anestos "Naz" Rodites; and William E. Rusin.

The questions presented for review in this Petition relate to a pre-trial motion to suppress evidence. Only three of the twenty-three defendants were found by the district court to have standing on the questions presented: Petitioner John F. "Duffy" Conley; Petitioner Sheila F. Smith and co-defendant John Francis "Jack" Conley.

The district court granted defendants' motion to suppress evidence, and the government appealed the order to the United States Court of Appeals for the Third Circuit. Participating as parties in the court of appeals were Respondent United States of America; Petitioner John F. "Duffy" Conley; Petitioner Sheila F. Smith; and co-defendant John Francis "Jack" Conley.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Sheila F. Smith respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on September 16, 1993.

OPINIONS BELOW

The opinion of the court of appeals is reported at *United States v. Conley, et al.*, 4 F.3d 1200 (3d Cir. 1993) and is reproduced in the Appendix, *infra*, at 1a.

The opinion of the district court granting suppression is reported at *United States v. Conley, et al.*, 813 F. Supp. 372 (W.D.Pa. 1993) and is reproduced in the Appendix, *infra*, at 16a.

JURISDICTION

Petitioner was charged by indictment in the United States district court with violating federal criminal statutes. The prosecution remains pending.

The government appealed a pre-trial order suppressing evidence, invoking the jurisdiction of the court of appeals under 18 U.S.C. § 3731. On September 16, 1993 the court of appeals entered its judgment reversing the order of suppression. 1a. A Petition for Rehearing In Banc filed on behalf of John F. "Duffy" Conley and Sheila F. Smith was denied by order entered October 14, 1993. 47a.

The jurisdiction of this Court to review a judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 1955(a), (b)

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

18 Pa.C.S. § 5513(a)(1)

(a) Offense defined.—A person is guilty of a misdemeanor of the first degree if he:

(1) intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards.

STATEMENT OF THE CASE

Petitioners are two of twenty-three defendants charged in a pending federal criminal prosecution with gambling offenses related to the operation of a vending company whose inventory included video poker machines. Petitioners are also charged with money laundering offenses for having allegedly deposited proceeds from the vending business into banking institutions.

Under 18 U.S.C. § 1955 it is a federal criminal offense to operate a gambling business which involves five or more

persons and is in violation of the law of the State or political subdivision in which it is conducted. Here, the predicate violation of State law is charged under section 5513 of the Pennsylvania Crimes Code. 18 Pa.C.S. § 5513. Under section 5513(a)(1) of the Code it is unlawful knowingly to sell, lease or maintain a "gambling device".

The investigation that resulted in this federal prosecution was begun by the City of Pittsburgh Police Department. The evidence suppressed by the district court had been seized under a search warrant issued by a state district justice to a city police officer on September 23, 1988.

On that date City Detective John Bosetti presented a search warrant application and affidavit of probable cause to District Justice Anne Marie Sharding. The Bosetti affidavit is reproduced in the Appendix to this Petition at 49a. The warrant application identified the crime under investigation as a violation of 18 Pa.C.S. § 5513, "Gambling devices, gambling, etc.", involving the maintenance and/or use of video poker machines.

Video poker machines are not categorically prohibited gambling devices under Pennsylvania law. Construing the forfeiture provisions of 18 Pa.C.S. § 5513(b), the Pennsylvania Supreme Court has held that only video poker machines equipped with "knock-off" switches, which facilitate gambling by allowing accumulated credits to be removed from the board, are forfeitable as *per se* gambling devices under section 5513(b). *Commonwealth v. Twelve Dodge City Video Poker Machines,* 517 Pa. 363, 537 A.2d 812, 814 (1988) (machines without knock-off switches were not gambling devices under section 5513, even though machines could have been converted to include those features in approximately 15 seconds); *Commonwealth v. Two Electronic Poker Game Machines,* 502 Pa. 186, 465 A.2d 973, 979 (1983) (no forfeiture of machines under section 5513 in absence of knock-off switch).

An otherwise legitimate amusement device can also be a gambling device under section 5513(a)(1) if it is used as the medium for gambling activity. Under Pennsylvania law the only benefit a player is permitted to receive for accumulated credits won on a video game machine is extended play. If a location owner instead pays the player cash for accumulated credits, the machine is forfeitable as a gambling device, whether or not it is a gambling device *per se*. *Commonwealth v. Hauck*, 326 Pa.Super. 461, 474 A.2d 332, 333 (1984). Under this theory of prosecution, a PacMan or a checkers board could qualify as a gambling device, depending on the manner in which the game is used.

The offense defined by section 5513(a)(1) is a specific intent crime, which requires a showing of intent that the machine was provided and/or maintained with the knowledge and intent that it be used for unlawful gambling purposes. *Commonwealth v. Dumont*, 370 Pa.Super. 155, 536 A.2d 342, 349 (1987), *app. den.*, 519 Pa. 659; *Commonwealth v. Rose*, 257 Pa.Super. 514, 390 A.2d 1356 (1978); *Commonwealth v. Bretz*, 289 Pa.Super. 259, 433 A.2d 55, 58 (1981).

The Bosetti affidavit averred that Pittsburgh police officers visited 50 businesses in the City of Pittsburgh that maintained video poker machines on the premises; that at 49 of these locations, officers observed players receive cash pay-offs from owners or employees of the business for accumulated credits on the machines; that vending licenses displayed at 42 of the locations listed Duffy's Vending as the owner of the machines; and that license applications filed by Duffy's Vending with a city regulatory agency listed a business address of 930 Saw Mill Run Boulevard. 49a-50a.

Bosetti's affidavit concluded with the request that a warrant to search 930 Saw Mill Run Boulevard "be issued in an effort to gain a better insight into the internal works of this gambling operation." 50a.

The district court concluded that the affidavit did not provide probable cause to search 930 Saw Mill Run Boulevard. The district court's findings included the following:

> 66. There is no basis for concluding that Duffy Conley, Duffy Vending Co. or any employee thereof knew or intended that Duffy Vending Co. video poker machines would be used as illegal gambling devices at any of the 42 locations that paid off on Duffy Vending Co. machines.
>
> 67. There is no basis for concluding that the Duffy Vending Co. video poker machines in place at forty-two of the forty-nine pay-off locations were illegal gambling devices per se.
>
> 68. The District Justice had no substantial basis for concluding that Duffy Conley, Duffy Vending Co. or any of his/its employees were violating Section 5513.
>
> 69. The District Justice had no substantial basis for concluding that evidence of a Section 5513 violation could be found on the premises of 930 Saw Mill Run Boulevard.

31a.

Having found that the warrant was not supported by probable cause, the district court went on to find that the affidavit was so facially deficient as to preclude objectively reasonable reliance on the warrant as a valid instrument of power to search. The search and seizure could not, therefore, be sanitized under the good faith exception of *United States v. Leon*, 466 U.S. 897 (1984).

Petitioners also argued before the district court that the warrant violated constitutional requisites of particularity and was overbroad. The warrant authorized law enforcement agents to search for and to seize the following:

> All video poker machines, keys for machines, accounting records, all revenue records, employee rec-

> ords, purchase orders from distributors and manufacturers of video poker machines, all records showing poker machine locations and any and all paraphenalia indicative of a gambling operation.

Because the district court invalidated the warrant on other grounds, it did not address the issue of overbreadth in its memorandum opinion.

The issue of overbreadth was raised by Petitioners before the court of appeals as an alternative ground for affirming the suppression order, citing *Thigpen v. Roberts,* 468 U.S. 27, 29-30 (1984) (court of appeals may affirm the result below on any ground that the law and the record permit, even if for reasons other than those cited by the district court) and *Smith v. Phillips,* 455 U.S. 209 (1982) (same).

The court of appeals reversed the district court. On the issue of probable cause, the court of appeals held that the district court had "applied an unduly narrow standard for evaluating probable cause". 2a. In *Illinois v. Gates,* 462 U.S. 213, 238 (1983) this Court held that the standard of review to be applied by the court is not *de novo.* Under *Gates* the duty of the reviewing court is to determine whether the magistrate had a substantial factual basis for concluding that probable cause existed.

The court of appeals took issue with the standard of review applied by the district court, as follows:

> The district court noted at length facts which the affidavit does not contain and, based on these omissions, determined that the affidavit did not support a finding of probable cause. By listing information the affidavit did not explicitly state, and focusing on these omissions, the district court essentially conducted a *de novo* review, which is not countenanced under *Gates.*

13a.

In concluding that the affidavit did provide a substantial factual basis for probable cause to search 930 Saw Mill Run Boulevard, the court of appeals applied the following logic:

> Of forty-nine locations where the machines were being used for illegal purposes, forty-two of them involved use of the machines owned by Duffy Vending Co. Because it is illegal to lease or sell machines knowing that they will be used for gambling, probable cause existed to believe that the lessor or vendor of the machines was involved in the gambling operations, and that evidence of this illegality would be present at the location of the lessor or vendor of the machines.

10a. The court of appeals identified no factual basis in the affidavit for concluding that Duffy Vending, as the lessor of the machines, had knowledge that the machines were being used for unlawful gambling purposes.

On the issue of overbreadth, the court of appeals held as follows:

> Read as a whole, the search warrant allows the seizure of items indicative of an illegal gambling operation. Since the warrant limits the search to items related to an illegal gambling operation, there is sufficient specificity, satisfying the particularity requirement of the Fourth Amendment.

14a.

A Petition for Rehearing filed on behalf of Petitioners John F. "Duffy" Conley and Sheila F. Smith was denied by Order entered October 14, 1993. 47a.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW UPHOLDING THE VALIDITY OF A WARRANT TO SEIZE ALL BUSINESS RECORDS AND ALL EVIDENCE "INDICATIVE OF A GAMBLING OPERATION" IS IN DIRECT CONFLICT WITH DECISIONS FROM THE SECOND, EIGHTH AND NINTH CIRCUITS.

The Fourth Amendment directs that, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This Court has previously held that in order to satisfy constitutional requisites, the warrant must provide sufficient particularity that the executing officer is left with no discretion to decide what may be searched for and seized. *Marron v. United States,* 275 U.S. 192, 196 (1927).

In *Maryland v. Garrison,* 480 U.S. 79, 84 (1987) this Court defined the constitutional imperative of the Warrant Clause in the following terms:

> The Warrant Clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.' The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, *the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.*

(Emphasis added.)

The warrant for 930 Saw Mill Run Boulevard gave law enforcement agents authority to search for and to seize *all* accounting records, *all* revenue records, *all* employee records, and *all* evidence 'indicative of a gambling

operation". Acting under the warrant's essentially unrestricted grant of authority, executing agents in fact seized every piece of paper found in the offices occupied by Duffy Vending Co. Nothing was left behind.

The warrant is overbroad, in that it authorizes seizure of items for which there is no probable cause. It also violates the particularity requirements of the Warrant Clause in failing to provide reasonable guidance to the executing officers regarding those items lawfully subject to seizure under the warrant.

The constitutional defects in the warrant may generally be broken down into two categories: (1) the "all records" category, which covers the warrant's grant of authority to seize all machines, all lists, all records, etc.; and (2) the "all evidence" category, which covers the grant of authority to search for and seize all evidence "indicative of a gambling operation".

The First and Tenth Circuits have considered "all records" warrants and have reached conclusions that directly conflict with the opinion of the Third Circuit in this case.

See, United States v. Leary, 846 F.2d 592, 601-605 (10th Cir. 1988) (warrant for "all records" maintained under arms export control regulations and "all documents relating to violation of arms export control act" overbroad); *United States v. Fuccillo*, 808 F.2d 173, 176 (1st Cir. 1987) (warrant for "all" cartons of merchandise overbroad); *United States v. Abrams*, 615 F.2d 541, 543 (1st Cir. 1980) (warrant authorizing seizure of all patient records insufficiently particular); *Application of Lafayette Academy, Inc.*, 610 F.2d 1, 3-4 (1st Cir. 1979) (warrant "framed to allow seizure of most every sort of book or paper at the described premises, limited only by the qualification that the seized item be evidence of a violation of [federal law]" overbroad); *United States v. Roche*, 614 F.2d 6, 7 (1st Cir. 1980) (warrant authorizing search for all insurance records overbroad).

The warrant also violates the particularity requirements of the Warrant Clause in failing to provide reasonable guidance to the executing officers regarding those items lawfully subject to seizure under the warrant. This defect is apparent in the warrant's grant of authority to search for and seize "all evidence" of gambling activity.

The opinion of the court of appeals explicitly approved the "all evidence" provision of the warrant, as follows:

> Read as a whole, the search warrant allows the seizure of items indicative of an illegal gambling operation. Since the warrant limits the search to items related to an illegal gambling operation, there is sufficient specificity, satisfying the particularity requirement of the Fourth Amendment.

14a.

This opinion puts the Third Circuit directly in conflict with the Second, Eighth and Ninth Circuits regarding the constitutional validity of "all evidence" warrants.

See, United States v. George, 975 F.2d 72, 75-77 (2d Cir. 1992) (warrant authorizing search for "other evidence relating to the commission of a crime" overbroad); *Center Art Galleries-Haw, Inc. v. United States*, 875 F.2d 747, 752-54 (9th Cir. 1989) (warrant authorizing search for documents comprising evidence of federal crime, "including, but not limited to" listed items, overbroad); *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985) (warrant authorizing search for "material evidence of a violation of 21 U.S.C. 841" overbroad); *United States v. LeBron*, 729 F.2d 533, 536 (8th Cir. 1984) (warrant authorizing seizure of "other property believed to be stolen" did not "provide reasonable guidance for the exercise of informed discretion"); *United States v. Whitten*, 706 F.2d 100, 1014-15 (9th Cir. 1983), *cert. den.*, 465 U.S. 1100 (warrant authorizing search for "evidence of narcotics trafficking" not sufficiently particular).

The opinion of the court of appeals, finding no constitutional defect in this warrant's grant of authority to search for and to seize all accounting records, all revenue records, all purchase orders, all employee records, and all evidence "indicative of a gambling operation", is in direct conflict with precedent from this Court and with decisions from the Second, Eighth and Ninth Circuits.

Petitioners therefore respectfully request that a writ of certiorari issue to review the opinion of the court of appeals.

II. THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS CREATES A CONFLICT AMONG THE CIRCUITS REGARDING THE PERMISSIBLE SCOPE OF REVIEW OF A MAGISTRATE'S DETERMINATION OF PROBABLE CAUSE.

The activity described in the Bosetti affidavit of probable cause is the use of legitimate amusement devices for gambling purposes by third parties having no demonstrated connection to Duffy's Vending. As the district court noted, there is no information in the affidavit connecting Duffy's Vending to the use of these machines for gambling purposes in June of 1988.

The district court found that the affidavit provided no factual basis for belief that Duffy's Vending, or John Duffy Conley, or any person acting on behalf of either Duffy's Vending or John Duffy Conley, was involved in the pay-offs or had any awareness that such pay-offs had been made. There is nothing to indicate that Conley and/or Duffy's Vending knew that the machines were being used for gambling purposes at the time the warrant issued. There is less than nothing to indicate that they provided or maintained the machines with the specific intent that they be used for such unlawful purposes.

Nor is not possible to infer the requisite knowledge and intent from the character of the machines themselves.

There is nothing in the affidavit indicating that any of the machines were equipped with knock-off switches or similar devices to facilitate their use for gambling purposes.

To say that this affidavit provides probable cause to search 930 Saw Mill Run Boulevard is to say that reports of fifty-cent wagers on checkers games would provide probable cause to search the corporate offices of Mattel.

The court of appeals held that the district court applied an improper standard of review by considering the *absence* of information connecting Duffy's Vending to the observed gambling activity. The court of appeals held that by discussing what was *not* in the affidavit, the district court was essentially undertaking a *de novo* review, in violation of this Court's opinion in *Illinois v. Gates,* 462 U.S. 213 (1983).

The court of appeals' opinion misapplies *Gates;* transgresses common sense; and creates a direct conflict with circuits that have held that the scope of review extends to consideration of what is not in an affidavit of probable cause.

In concluding that a warrant issued by a federal magistrate was not adequately supported by probable cause, the court of appeals in *United States v. Weber,* 923 F.2d 1228 (9th Cir. 1990) explicitly relied on what was not in the affidavit of probable cause, including the absence of information regarding the target's personal involvement in the crime under investigation. Similarly, in *United States v. Craig,* 861 F.2d 818, 821 (5th Cir. 1988) the court of appeals held that the first duty of a reviewing court is, "to examine the affidavit, looking to see what it did, and did not establish regarding [the defendant's] activities." In ordering the suppression of evidence in *United States v. Hove,* 848 F.2d 137, 139-140 (9th Cir. 1988), the court of appeals similarly noted the absence of particularized information regarding the place to be searched.

In holding to the contrary, the Third Circuit puts itself in conflict with both the Fifth and the Ninth Circuits regarding the applicable standard of review.

The best Detective Bosetti could do in this case was to tell the district justice that he needed a search warrant in order "to gain a better insight" into the Conley business. This was a fishing expedition, pure and simple. For a federal court of appeals effectively to sanction such procedure by distorting the applicable standard of review violates principles of constitutional jurisprudence that have been recognized and enforced by this Court for over a century.

Petitioners therefore respectfully request that a writ of certiorari issue to review the decision below.

III. WHETHER *UNITED STATES v. LEON*, 468 U.S. 897 (1984) SHOULD APPLY IN EVALUATING THE ADMISSIBILITY IN FEDERAL COURT OF EVIDENCE SEIZED BY STATE AGENTS UNDER A STATE WARRANT, WHERE THE STATE'S HIGHEST COURT HAS DECLINED TO ADOPT THE GOOD FAITH EXCEPTION, IS A QUESTION THAT MERITS REVIEW BY THIS COURT.

This case would provide the Court with an excellent record for reviewing the implications of applying the good faith exception to a state warrant issued under vastly different policies and procedures than those presented to the Court in *United States v. Leon*, 468 U.S. 897 (1984).

At the core of the good faith exception under federal law is the principal that law enforcement agents should be entitled to rely on the judgment of the issuing magistrate regarding the validity of the search warrant. *United States v. Leon, supra.*

The distinctions between federal and state warrant practice begin with the qualifications of the issuing authority.

Under federal law the issuing magistrate is required to be a lawyer with at least five years' experience in the practice of law. 28 U.S.C. § 631(b). That is not the case under Pennsylvania law. Under Pennsylvania law the only qualification for the elected post of district justice is that the candidates have resided within the magisterial district for one year. Pennsylvania Constitution, Art. V, § 12; 42 Pa.C.S. § 3101(a). There are no educational requirements; no minimum age requirements; and no requirements related to work experience. After election, forty hours' instruction is provided covering all aspects of civil and criminal law, "including evidence and procedure, summary proceedings, motor vehicles and courses in judicial ethics." 42 Pa.C.S. 3113.

Anne Marie Scharding, the district justice who issued the warrant in question, had been a secretary in the same office prior to her election as district justice.

As noted, one of the fundamental premises of *Leon* is that a law enforcement agent should be able to rely on the presumably greater knowledge and more educated judgment of the issuing authority in executing a search warrant. That premise evaporates under State law, where the police officer applying for the search warrant is more experienced and more educated on warrant procedure than the district justice.

In *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991) the Pennsylvania Supreme Court confronted the question whether the good faith exception of *Leon* should be incorporated into Pennsylvania law. After reviewing the fundamental premise of the good faith exception under federal law and concluding that the premise was largely illusory under Pennsylvania practice and procedure, the court declined to adopt the good faith exception for Pennsylvania.

In *Edmunds* the court focused on several critical distinctions between federal and state practice. First, the

court noted that, "As the instant case illustrates, police officers and magistrates have historically worked closely together in this Commonwealth." *Id.*, 586 A.2d at 904. The Court held that given the particular nature of the working relationship between police officers and magistrates in Pennsylvania, the good faith exception did not adequately accommodate the danger that magistrates might become "rubber stamps". *Ibid.*

The record in this case, which will be reviewed, *infra*, provides a vivid illustration of the working relationship which troubled the court in *Edmunds*.

A further concern cited by *Edmunds* in rejecting the good faith exception was the danger of "magistrate shopping". *Ibid.* Under Pennsylvania law a search warrant application may be taken to any issuing authority in the county, whether or not the place to be searched is within the his or her magisterial district. Pennsylvania Rule of Criminal Procedure 2001. This gives law enforcement agents unfettered discretion to choose the district justice for review of a warrant application.

District Justice Scharding's magisterial district did not happen to include 930 Saw Mill Run Boulevard. Detective Bosetti testified that he had been instructed by his superior to take the warrant applications to District Justice Scharding, rather than to a city magistrate, because she had been selected by the state police to handle all warrants related to the video poker investigation. Bosetti therefore got into his car and drove twenty minutes to Scharding's office with the applications, although a city magistrate was right down the hall.

Under a directive from the Mayor of the City of Pittsburgh, Pittsburgh city magistrates must be lawyers.

During her testimony District Justice Scharding acknowledged her county-wide jurisdiction, but stated that in practice, she was usually called upon to exercise such

jurisdiction only when a city magistrate was not available. She said that it was "unusual" for a city detective to bring warrant applications to her office during regular business hours.

The warrant in question here was issued on September 23, 1988. The day before, as part of the same investigation, state and city officers presented over one hundred warrant applications to District Justice Scharding. A Pennsylvania State Police trooper appeard with over fifty applications in the morning; Detective Bosetti brought forty-nine more applications at lunchtime. Evidence seized pursuant to those warrants was later suppressed by the state court, based on the district justice's admission that she had not read all of the affidavits before signing the warrants.

District Justice Scharding testified before the district court that on September 22, 1988 one of the secretaries in her office called her at home to let her know that a state trooper had arrived with a large number of warrant applications. Without having seen any of the applications, the district justice instructed her secretary by phone to pick a time of issuance and put it on the warrants, next to the line for the issuing authority's signature. After the district justice's arrival at the office, police officers and office staff worked together to complete the applications and warrants. The secretaries affixed the district justice's stamp; and her official seal was affixed by a state trooper. She administered the oath to the affiant with reference the undifferentiated contents of a file box with a number of search warrants inside, asking simply whether "everything" was true.

District Justice Scharding testified that later that day she used the same procedure for Detective Bosetti's warrants. Detective Bosetti testified that the district justice's signature was already on the warrants at the time he signed his affirmaion.

When asked about her evaluation of the statement of probable cause in Detective Bosetti's affidavits on September 22, 1988, District Justice Scharding testified that the fact that the detective had sworn to the accuracy of he affidavit was enough to justify issuance of the warrants.

Regarding the September 22 warrants, the district justice testified that she had not read each and every page of each application, because she could see they were the same without reading them. The district justice further testified that, "I didn't think they needed that big long explanation", because she already knew what a gambling machine was. After the suppression order was filed in the state case, the district justice wrote a letter to the newspaper, complaining that she could hardly see why she should have to read the same pages a hundred times over.

All of this testimony was offered concerning issuance of related warrants on September 22, 1992, the day before issuance of the warrant for 930 Saw Mill Run Boulevard. The testimony is reviewed here, because it provides the context for Petitioners' contention that the premise of the *Leon* good faith exception is substantially weakened outside the area of federal practice.

This record demonstrates that the court's concerns in *Edmunds* regarding application of the good faith exception to Pennsylvania searches were well-taken. Under the law and practice of the forum, the fact that this warrant had the approval of the issuing authority is not deserving of the same deference that *Leon* provides for federal magistrates.

The central premise of *Leon* is that a federal agent should be entitled to rely on the judgment of a federal magistrate in approving a warrant for issuance and execution. Whether, and how, *Leon* should be applied when its fundamental premises evaporate in the less rarefied air of state procedure is a question that merits review by this Court.

CONCLUSION

For these reasons, the petition for writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Filed September 16, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3095

UNITED STATES OF AMERICA,

v. *Appellant*

JOHN F. "DUFFY" CONLEY; WILLIAM C. CURTIN; SHEILA F. SMITH; JOHN FRANCIS "JACK" CONLEY; THOMAS "BUD" MCGRATH; MARK A. ABBOTT; THOMAS ROSSI; WILLIAM STEINHART; ROBERTA FLEAGLE; ROBIN SPRATT; MONICA C. KAIL; WILLIAM J. REED; JOANNE T. SMITH; KENNETH "RON" GOODWIN; LAWRENCE N. "NEUDY" DEMINO, SR.; CHRISTOPHER "CHRIS" KAIL; JOSEPH A. DEVITA; FRANK GAROFALO; THOMAS D. CIOCCO; MICHAEL SUKALY; PHILIP M. "MIKE" FARRELL; AMESTOS "NAZ" RODITES; WILLIAM E. RUSIN

On Appeal from the United States District Court
for the Western District of Pennsylvania

(D.C. Cr. No. 91-00178)

Argued August 11, 1993

Before: Scirica, Cowen and Rosenn
Circuit Judges

(Filed September 16, 1993)

OPINION OF THE COURT

COWEN, *Circuit Judge.*

The United States appeals from an order entered by the district judge suppressing evidence obtained by police pursuant to a search warrant. The district court concluded that the search warrant was not supported by probable cause and suppressed from evidence the fruits of the search. Because we find that the district court applied an unduly narrow standard for evaluating probable cause, and the search warrant is supported by probable cause, we will reverse.

I.

On September 23, 1988, members of the City of Pittsburgh Police Department executed a search warrant for a commercial building located at 930 Saw Mill Run Boulevard in the City of Pittsburgh. Earlier that day, Detective John Bosetti presented an application and affidavit of probable cause for a search warrant to District Justice Anne Marie Scharding ("the magistrate"). Bosetti, at the time, was involved in an investigation of illegal gambling activity involving video poker machines. The major issue presented in this case is whether the affidavit on its face provided a substantial basis for the magistrate's finding of probable cause. Accordingly, we set forth in full the statements contained in Bosetti's affidavit:

> In June of 1988, affiant began an investigation into a gambling operation, involving video poker machines. During this time frame, affiant and other Dets [Detectives] from the Pittsburgh Police Organized Crime Unit, visited over fifty (50) various locations, throughout [sic] the City of Pittsburgh, that contained video poker machines. Dets were able to play, at random, these poker machines and received cash payments/pay-offs for credits they had accumulated, in fortynine [sic] (49) different locations. During this period, Dets observed numerous cash pay-offs to

other individuals that were playing poker machines and had acquired [sic] the set amount of credits needed. A detailed accounting of every location is given in each affidavit for search warrant. The City of Pgh. requires a permit for anytype [sic] of video/ mechanical amusement device that is placed inside a particular business and made available to the public. Once the establishment registers, they are given a plaque which must be placed inside the premises so it can be viewed by the public. Dets found that of the 49 locations visited, 42 listed Duffy's Vending Co [sic] as the owner of the video poker machines. Dets then examined the permit application form, from these 42 locations and found that Duffy's Vending Co., lists it's [sic] business address as 930 Sawmill Run Blvd., Pgh, Pa. 15220.

On Sep [sic] 15, 1988, affiant observed a Ford pick-up truck transporting a load, of what appeared to be video devices, covered in black plastic. For intelligence purposes, affiant checked the registration plate, Pa#YC-42550 and found it to be registered to Duffy's Vending Co., 930 Sawmill Run Blvd.

The telephone number, 431-6582, is listed as the telephone number for Duffy's Vending Co., as stated on the application for the City of Pgh license permits. Affiant called this number on Sep [sic] 22, 1988 and found it be answered "Duffy's Vending". Affiant checked the Bell of Pa [sic] yellow pages, both Consumer and Business to Business, but found no listing for Duffy's Vending Co.

On March 16, 1988, John Duffy Conley was found guilty for violating Sec #5513, [sic] of the Pa [sic] Crimes Code, Gambling Devices. John Duffy Conley is listed as the individual owner of Duffys [sic] Vending Co. This conviction was a result of an investigation, inwhich [sic] affiant participated in, that lead to Conleys [sic] arrest for his involvement [sic] in the Slovak Civic Federation of Allegheny

> County, AKA Slovak Club. In summary, Dets entered the Slovak Club on [sic] various times allowing them to play various machines. They were able to obtain a cash payoff after accumulating the required amount of credits on the video poker machines.
>
> Based on the above information, affiant concludes that the business address of Duffy's Vending Co., is 930 Sawmill Run Blvd., Pittsburgh, Pa. 15220 and request [sic] that this search warrant be issued in an effort to gain a better insight into the internal works of this gambling operation. Therefore I request that a search warrant be issued.

App. at 42(a)-43.

The magistrate reviewed the affidavit and application, found probable cause to search the building located at 930 Saw Mill Run Blvd., and issued a warrant which authorized the search and seizure of the following items:

> All video poker machines, keys for machines, accounting records, all revenue records, employee records, purchase orders from distributors and manufactors [sic] of video poker machines, all records showing poker machine locations and any and all paraphernalia indicative of a gambling operation.

App. at 42. The warrant was executed on September 23, 1988. The search resulted in the seizure of documentary evidence relevant to Duffy Vending Company. Among the items seized were several bundles of canceled checks for Duffy Vending, personnel record sheets, written notes pertaining to Duffy Vending, sales receipts and several documents concerning employees of Duffy Vending.

As a result of the investigation and search, a federal grand jury returned an indictment against John F. "Duffy" Conley, John F. "Jack" Conley; Shelia F. Smith and others. The indictment included charges that the defendants had engaged in an illegal gambling business and a

gambling conspiracy involving video poker machines in violation of 18 U.S.C. §§ 371 and 1955.

Defendants filed a motion to suppress the evidence seized pursuant to the warrant, and an evidentiary hearing was held before the district court. The district court granted the motions to suppress the evidence seized at 930 Saw Mill Run Blvd., holding that the affidavit in support of the search warrant was insufficient to indicate probable cause for the intended search. The government appeals the suppresison order. We have jurisdiction to hear this appeal by virtue of 18 U.S.C. § 3731.

II.

Probable cause determinations are necessarily fact-intensive; thus, the standard of review can be outcome determinative. It is important to distinguish between the standard of review which we exercise over a district court, and the standard of review which both we and the district court are to apply to the initial probable cause determination by the magistrate.

When a district court, in reviewing a magistrate's determination of probable cause, bases its probable cause ruling on facts contained in an affidavit, we exercise plenary review over the district court's decision. *United States v. Jones,* 994 F.2d 1051, 1055 & n.5 (3d Cir. 1993); *see also United States v. Deaner,* No. 92-7626, 1993 WL 282662, at *3 (3d Cir. July 29, 1993); *United States v. Cruz,* 910 F.2d 1072, 1076 (3d Cir. 1990), *cert. denied,* 498 U.S. 1039, 111 S.Ct. 709 (1991); *United States v. Belle,* 593 F.2d 487, 497 (3d Cir.), *cert. denied,* 442 U.S. 911, 99 S.Ct. 2825 (1979). *Accord, e.g., United States v. Patrick,* 959 F.2d 991, 996 n.6 (D.C. Cir. 1992) ("We review de novo the district court's ultimate conclusion that the search did not violate the fourth amendment."); *United States v. Uribe-Velasco,* 930 F.2d 1029, 1032 (2d Cir. 1991); *United States v. Arellano-Rios,* 799 F.2d 520, 522 (9th Cir. 1986);

United States v. Rambis, 686 F.2d 620, 622 (7th Cir. 1982) ("Whether the information in the affidavit establishes probable cause is a determination based solely on written evidence. Since this determination involves the application of law rather than an evaluation of factual evidence, on review the appellate court is not limited to a determination of whether the district court's finding was clearly erroneous. I must independently review the sufficiency of the affidavit . . . ."); *United States v. Minis,* 666 F.2d 134, 138 (5th Cir.), *cert. denied,* 456 U.S. 946, 102 S.Ct. 2013 (1982); *see also Ker v. California,* 374 U.S. 23, 33-34, 83 S.Ct. 1623, 1630 (1963). In the matter presently before us, we exercise plenary review over the district court because the district court found that the affidavit, on its face, did not provide a substantial basis for a finding of probable cause. *Jones,* 994 F.2d a 1055 & n.5.

In contrast, both we and the district court exercise only a deferential review of the *initial* probable cause determination made by the magistrate. *Illinois v. Gates,* 462 U.S. 213, 236, 103 S.Ct. 2317, 2331 (1983) ("A magistrate's 'determination of probable cause should be paid *great deference* by reviewing courts.' " (emphasis added) (quoting *Spinelli v. United States,* 393 U.S. 410, 419, 89 S.Ct. 584, 590 (1969)).[1] "[T]he duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]' that probable cause existed." *Gates,* 462 U.S. at 238, 103 S.Ct. at 2332 (quoting *Jones v. United States,* 362 U.S. 257, 271, 80 S.Ct. 725, 736 (1960)). Keeping in mind that the task of the issuing magistrate is simply to determine whether there is a "fair probability that contraband or evidence of a crime will be found in a particular place," *id.* (emphasis added), a reviewing court is to uphold the war-

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[1] See also *Jones,* 994 F.2d at 1055 ("[O]ur review of the magistrate judge's probable cause determination is identical to that of the district court.")

rant as long as there is a substantial basis for a fair probability that evidence will be found.[2]

The Supreme Court has instructed that a reviewing court may not conduct a *de novo* review of a probable cause determination. *Id.* at 236, 103 S.Ct. at 2331. Even if a reviewing court would not have found probable cause in a particular case, it must nevertheless uphold a warrant so long as the issuing magistrate's determination was made consistent with the minimal substantial basis standard. Consistent with these teachings, we recently stated:

> In reaching our conclusionfi we recognize that a different magistrate judge might have found the affidavit insufficient to support a warrant. However, our role is not to make our own assessment as to whether probable cause existed. Rather, we are constrained to determine only whether the affidavit provided a sufficient basis for the decision the magistrate judge actually made.

Jones, 994 F.2d at 1057.

This standard "does not mean that reviewing courts should simply rubber stamp a magistrate's conclusions." *United States v. Tehfe*, 722 F.2d 1114, 1117 (3d Cir.

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[2] "The task of a reviewing court, the *Gates* majority makes plain, is even more modest—'simply to ensure that the magistrate had a substantial basis for . . . conclud[ing] that probable cause existed.' In other words, the warrant is to be upheld as long as there is a 'substantial basis' for a 'fair probability' that evidence will be found in a particular case. *Not much, is it?*" Kamisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 Iowa L. Rev. 551, 569-70 (1984) (emphasis added) (footnote omitted). *See also, United States v. Leon*, 468 U.S. 897, 958, 104 S.Ct. 3405, 3444 (Brennan, J., dissenting) (noting the "relaxed standard" of the *Gates* decision).

At least one court of appeals has interpreted the substantial basis standard as so deferential that it has equated it to a clearly erroneous standard. *United States v. Spears*, 965 F.2d 262, 269-70 (7th Cir.) (issuing magistrate's probable cause determination must be upheld unless clearly erroneous), *cert. denied*, —— U.S. ——, 113 S.Ct. 502 (1992).

1983), *cert. denied sub nom., Sanchez v. United States,* 466 U.S. 904, 104 S.Ct. 1679 (1984). Nevertheless, the role of the reviewing court is quite limited. The Supreme Court has directed that "although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to accorded to warrants." *United States v. Ventresca,* 380 U.S. 102, 109, 85 S.Ct. 741, 746 (1965) (emphasis added), *quoted with approval in Gates,* 462 U.S. at 237 n.10, 103 S.Ct. at 2331 n.10.

III.

A. PROBABLE CAUSE

With the above in mind, the affidavit presented to the magistrate provided a substantial basis for a finding of probable cause to search the premises in question. The supporting affidavit must be read in its entirety and in a common sense and nontechnical manner. *Gates,* 462 U.S. at 230-31, 103 S.Ct. at 2328. Read in this manner, the affidavit contained ample facts to support a magistrate's finding of probable cause to believe that evidence of wrongdoing would be found at the premises.

Detective Bosetti's affidavit included the following information: detectives played video poker machines in numerous locations; the detectives received illegal cash pay-offs for credits they had accumulated on these machines at forty-nine locations; the City of Pittsburgh requires permits for any type of video or mechanical amusement device which is used in a place of business; these permits must be made available to the public; the detectives were able to ascertain the owner of the machines by examining these permits; of the forty-nine locations in which the machines were being used in conjunction with illegal pay-offs, forty-two of them listed Duffy's Vending Co. as the owner of the machines; the permit application forms for the machines listed the address of Duffy's Vend-

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ing Co. as 930 Sawmill Run Blvd.; a license plate of a truck appearing to transport a load of video devices was traced to the address of 930 Sawmill Run Blvd.; John "Duffy" Conley is listed as the owner of Duffy's Vending Co.; on March 16, 1988, John "Duffy" Conley was found guilty for violating Title 18, Pennsylvania Consolidated Statutes Annotated, Section 5513;[3] this conviction involved exactly the same type of illegal pay-offs through the use of video poker machines as was being investigated at the time the affidavit was written. These facts provided probable cause to believe that there was a fair probability that evidence of wrongdoing would be present at 930 Sawmill Run Blvd.

The defendants rely heavily on the fact that, under Pennsylvania law, video power machines are not per se illegal gambling devices absent a "knock down" button, and that mere possession or distribution of these machines is not illegal.[4] But regardles of whether the machines had

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[3] Title 18, Pennsylvania Consolidated Statutes Annotated, Section 5513 provides in relevant part:

§ 5513. Gambling devices, gambling, etc.

(a) Offense defined.—A person is guilty of a misdemeanor of the first degree if he:

(1) intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards;

(2) allows persons to collect and assemble for the purpose of unlawful gambling at any place under his control;

(3) solicits or invites any person to visit any unlawful gambling place for the purpose of gambling; or

(4) being the owner, tenant, lessee or occupant of any premises, knowingly permits or suffers the same, or any part thereof, to be used for the purpose of unlawful gambling.

18 Pa. Cons. Stat. Ann. § 5513(a) (Purdon 1983).

[4] *See Commonwealth v. Two Elec. Poker Game Mach.*, 502 Pa. 186, 197-98, 465 A.2d 973, 979 (1983).

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a "knock down" button, the machines were being used for illegal purposes. The affidavit states that detectives personally received cash pay-offs for having accumulated credits on the machines. Of forty-nine locations where the machines were being used for illegal purposes, forty-two of them involved use of the machines owned by Duffy Vending Co. Because it is illegal to lease or sell machines knowing that they will be used for gambling,[5] probable cause existed to believe that the lessor or vendor of the machines was involved in the gambling operations, and that evidence of this illegality would be present at the location of the lessor or vendor of the machines.

Even if it could be assumed that no probable cause existed to believe that the lessor or owner himself was involved in the illegality, there was certainly probable cause to believe that business records or other instrumentalities kept at 930 Sawmill Run Blvd. would contain information leading to whether the other lessees or purchasers of the machines were using the machines illegally. This would justify the search. This was not an arrest warrant—it was a search warrant. The facts provided in the affidavit provided probable cause to believe that evidence of illegal gambling, not necessarily on the part of the owner of Duffy's Vending Co. himself, would be present at 930 Sawmill Run Blvd. In *Tehfe,* we pointed out that

> [w]hen reviewing an application [for a warrant], courts must . . . bear in mind that search warrants are directed, not at persons, but at property where there is probable cause to believe that instrumentalities or evidence of crime will be found. The affidavit in support of a warrant need not present information that would justify the arrest of the individual in possession of or in control of the property. Nor is it required that the owner be suspected of having committed a crime. Property owned by a person abso-

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[5] See *infra* note 3.

> lutely innocent of any wrongdoing may nevertheless be searched under a valid warrant.

722 F.2d at 1117-18 (citation omitted). The fact that John "Duffy" Conley, the owner of the company, is being prosecuted, should not obscure the fact that the original warrant was issued not to arrest John "Duffy" Conley, but rather to search the premises of 930 Sawmill Run Blvd. for evidence of illegal gambling.

It is true that the affidavit does not provide direct evidence that proof of wrongdoing would be present at the premises which were to be searched pursuant to the warrant. However, direct evidence linking the place to be searched to the crime is not required for the issuance of a search warrant. *Jones,* 994 F.2d at 1056. "Instead, probable cause can be, and often is, inferred by 'considering the type of crime, the nature of the items sought, the suspect's opportunity for concealment and normal inferences about where a criminal might hide stolen property.'" *Id.* (quoting *United States v. Jackson*, 756 F.2d 703, 705 (9th Cir. 1985)) (citing cases in accord). The normal inferences which can be drawn from the facts presented in the affidavit could lead a magistrate to reasonably link the illegal pay-offs made at the various locations to the premises located at 930 Sawmill Run Blvd. Detective Bosetti's affidavit described in detail that the official permits listed 930 Sawmill Run Blvd. as the address of the owner of the machines which were being used for illegal gambling.

In addition to the above information, the affidavit contains another critical fact which supported probable cause. Detective Bosetti set forth that John "Duffy" Conley had been convicted in 1988 for violating a Pennsylvania gambling statute.[6] The affidavit also revealed that the conviction was made in connection with the use of machines for illegal pay-offs. The use of prior arrests and convic-

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[6] See *infra* note 3.

tions to aid in establishing probable cause is not only permissible, *e.g., United States v. Frost,* No. 92-3579, 1993 WL 270140, at *6 (3d Cir. July 22, 1993); *United States v. McNally,* 473 F.2d 934, 940 & n.14 (3d Cir.), *aff'd,* 491 F.2d 751 (3d Cir. 1973), *cert. denied,* 417 U.S. 948, 94 S.Ct. 3074 (1974); *United States v. Jakobetz,* 955 F.2d 786, 803-04 (2d Cir.), *cert. denied,* 113 S.Ct. 104 (1992); *see also United States v. Harris,* 403 U.S. 573, 582, 91 S.Ct. 2075, 2081 (1971), but is often helpful. This is especially so where, as in the matter presently before the court, the previous arrest or conviction involves a crime of the same general nature as the one which the warrant is seeking to uncover.

Defendants contend that the last paragraph of the affidavit, in which Detecitve Bosetti stated that he "request [sic] that this search warrant be issued in an effort to gain a better insight into the internal works of this gambling operation," App. at 43, reveals that there was no probable cause to issue the warrant. Considered in isolation, this sentence might suggest a paucity of information on behalf of the officer linking the premises to any gambling operation. However, an affidavit "should not be judged as an entry in an essay contest, but, rather, must be judged by the facts it contains." *Harris,* 403 U.S. at 579, 91 S.Ct. at 2080 (quoting *Spinelli,* 393 U.S. at 438, 89 S.Ct. at 600 (Fortas, J., dissenting)). Affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity . . . have no proper place in this area." *Ventresca,* 380 U.S. at 108, 85 S.Ct. at 746, *quoted with approval in Gates,* 462 U.S. at 235, 103 S.Ct. at 2330-31.

Moreover, statements in an affidavit may not be read in isolation—the affidavit must be read as a whole. *United States v. Brown,* Nos. 92-3491, 92-3562, 1993 WL 294435, at *9 n.5 (3rd Cir. August 9, 1993); *Gates,* 462 U.S. at 238, 103 S.Ct. at 2332. An affidavit which

contains unwise, poorly crafted or otherwise defective statements may nevertheless support a valid warrant.[7] Apart from the problematic statement, the other portions of the affidavit, taken as a whole, provide a substantial basis for a probable cause determination.

The district court noted at length facts which the affidavit does not contain and, based on these omissions, determined that the affidavit did not support a finding of probable cause. By listing information the affidavit did not explictly state, and focusing on these omissions, the district court essentially conducted a *de novo* review, which is not countenanced under *Gates*. The district courts should focus not on what information an affidavit does not include, but rather on the information it does contain. Considering what the affidavit does state, the district courts should simply ask whether those facts could provide to a magistrate a substantial basis for a fair probability that evidence of wrongdoing will be found.

B. OVERBREADTH

We briefly address defendant's contention that the warrant was overbroad.[8] General warrants are prohibited by the Fourth Amendment. In order to prevent the police from conducting a general, exploratory rummaging, a warrant must give a particular description of the things

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[7] This follows from the rule that where a misrepresentation or an omission is included in an affidavit, the affidavit may nevertheless support a valid warrant if information contained in the affidavit, independent of the defective portion, supports a probable cause finding. *Frost*, 1993 WL 270140, at **5-6 (3d Cir. July 22, 1993). This is true even where the misrepresentation or omission is made intentionally or knowingly, or made with reckless disregard for the truth. *Id.* In relying on *Frost* for this principle, we do not suggest that the affidavit in this case involves any material omission or misrepresentation.

[8] Because the district court found that there was no probable cause, it did not address the oberbreadth issue.

to be seized. *E.g., Andresen v. Maryland,* 427 U.S. 463, 480, 96 S.Ct. 2737, 2748 (1976). Defendants focus on the use of the word "all" in the warrant ("all revenue records"). But use of the word "all," in and of itself, does not render a warrant a general warrant. *See United States v. Christine,* 687 F.2d 749, 753 (3d Cir. 1982).

Moreover, the phrases in a search warrant must be read in context and not in isolation. *United States v. Johnson,* 690 F.2d 60, 64 (3d Cir. 1982), *cert. denied,* 459 U.S. 1214, 103 S.Ct. 1212 (1983). Read as a whole, the search warrant allows the seizure of items indicative of an illegal gambling operation. Since the warrant limits the search to items related to an illegal gambling operation, there is sufficient specificity, satisfying the particularity requirement of the Fourth Amendment.

In *Johnson* we stated that we should uphold warrants that contain a general authorization to seize "instrumentalities of the commission of the crime of conducting an illegal gambling business." *Id.* at 66 (citation omitted). "This is sound, as the nature of the crime is such that these instrumentalities are reasonably subject to identification, and the in-premises conduct of such illegal activities would make greater particularity impossible." *Id.* "Likewise, in searches for papers, it is certain that some innocuous documents will be at least cursorily perused in order to determine whether they are among those papers to be seized. But no tenet of the Fourth Amendment prohibits a search merely because it cannot be performed with surgival precision." *Christine,* 687 F.2d at 760. In light of these well established principles, defendants' overbreadth challenge to the warrant lacks merit.

IV.

The order of the district court which suppressed the search on September 23, 1988, will be reversed.[9]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[9] Because we find that the warrant was supported by probable cause, we need not address the issue of whether the officers acted in good faith reliance of the warrant.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 91-178

UNITED STATES OF AMERICA,
Appellant

v.

JOHN F. "DUFFY" CONLEY, WILLIAM C. CURTIN, SHEILA F. SMITH, JOHN FRANCIS "JACK" CONLEY, THOMAS "BUD" MCGRATH, MARK A. ABBOTT, THOMAS ROSSI, WILLIAM STEINHART, ROBERTA FLEAGLE, ROBIN SPRATT, MONICA C. KAIL, WILLIAM J. REED, JOANNE T. SMITH, KENNETH "RON" GOODWIN, LAWRENCE N. "NEUDY" DEMINO, SR., CHRISTJPHER "CHRIS" KAIL, JOSEPH A. DEVITA, FRANK GAROFALO, THOMAS D. CIOCCO, MICHAEL SUKALY, PHILLIP M. "MIKE" FERRELL, ANESTOS "NAZ" RODITES, and WILLIAM E. RUSIN,
Defendants.

MEMORANDUM OPINION

February 3, 1993.

Before the Court is the issue of the suppression of the fruits of a September 23, 1988 search of a building located at 930 Saw Mill Run Boulevard.

I. Standing

A. *Findings of Fact*

1. In September 1988, 930 Saw Mill Run Boulevard ("930 Saw Mill Run" or "the premises") was a two-story, brown-brick building located between a gasoline

station and a salt or cinder pile in a strip of commercial properties. The words "Conley Motor Freight" were painted on the outside of the building.

2. The building had two entrances, one facing the street and one in the rear of the building. The front door could be unlocked from the outside, and the first floor office space could be accessed by the use of second key. The back entrance consisted of a storm door and an inner door. The back entrance could not be unlocked from the outside.

3. "No trespassing" signs were posted in the front door, the back door and a window on the right side of the building (viewed from the street). Persons seeking to enter the premises were directed by a sign to the back entrance.

4. Inside the back doors was a storage room. Beyond the storage room, through another doorway, was the first floor office space. The second story also contained office space.

5. Defendant John Francis "Jack" Conley ("Jack Conley") owned the real estate and building comprising the premises.

6. Two businesses occupied the premises: Conley Motor Freight, a steel hauling and trucking business, and Duffy Vending Company ("Duffy Vending"), a vending company.

7. Jack Conley owned Conley Motor Freight. He had two employees. One worked in the first-floor office space, and the other worked in a garage in the same building. Six or seven independent truckers were associated with Conley Motor Freight. They each made an average of two visits per week to the premises.

8. Jack Conley maintained a desk in the first floor office space of the premises, situated near the right-side

window to afford him a view of persons entering and exiting the premises.

9. Jack Conley worked at the premises on a daily basis, spending a considerable amount of time there each week.

10. Conley Motor Freight's business at the premises was conducted by a telephone registered to Conley Motor Freight. Conley Motor Freight did not solicit walk-in business at the premises in any manner.

11. Defendant John F. "Duffy" Conley ("Duffy Conley"), Jack Conley's son, owned Duffy Vending. Defendants Shelia F. Smith and William C. Curtin were employees of Duffy Vending. Defendant Sheila Smith and one Helen Grosskopf worked at the premises as full-time secretaries.

12. Duffy Conley, as owner of Duffy Vending, maintained operational control over its business and records. All Duffy Vending business records were maintained at the premises.

13. Duffy Conley had a desk in the first-floor office space of the premises, in which he kept customer contracts, bills, notes and agreements. In a filing cabinet next to his desk, he kept checkbooks, canceled checks, bank statements and deposit slips.

14. Helen Grosskopf and Sheila Smith each had a desk on the premises and maintained Duffy Vending records in their desks.

15. William Curtin did not have a desk on the premises.

16. Duffy Conley worked at the premises at least forty-five minutes a day, five days a week. He occasionally worked there on evenings and weekdays. He reviewed and balanced customer accounts using all the records maintained on the premises.

17. Duffy Vending did not solicit walk-in business in any manner. No showroom existed on the premises, and customers were not invited to the premises.

18. Persons who regularly frequented the premises were limited to Jack Conley, his two employees, the independent truckers, Duffy Conley, Sheila Smith, Helen Grosskopf and Patrick Barth, a United Parcel Service driver who made deliveries an average four times a week.

19. Occasionally, other employees of Duffy Vending visited the premises, as did personal friends of Jack Conley.

20. The indictment charges that William C. Curtin was had an interest in and much supervisory control over the charged illegal gambling business. Specifically, it charges that he was the general manager of Duffy Vending Co. Indictment at 2, ¶ 3. It charges that he, among others, conducted, managed and owned an illegal gambling business. *Id.* at 8, ¶ 21(a), 34. It further charges that he and Duffy Conley used the proceeds of the illegal gambling business to pay cash supplements to the employees of Duffy Vending. *Id.* at 14, ¶ 32.

21. Jack Conley had a subjective expectation that the premises would remain free from private and governmental intrusions.

22. Duffy Conley had a subjective expectation that the premises would remain free from private and governmental intrusions.

23. Sheila Smith had a subjective expectation that the premises would remain free from private and governmental intrusions.

B. *Conclusions of Law.*

24. "Whether these defendants can demonstrate an invasion of their own Fourth Amendment privacy interests 'depends not upon a property right in the invaded

place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place.' " *United States v. Acosta*, 965 F.2d 1248, 1256 (3d Cir. 1992) (emphasis deleted) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). Standing to challenge a search cannot be founded only on a legitimate expectation of privacy in the *items* seized; there must be a legitimate expectation of privacy in the *areas* searched. *United States v. Leary*, 846 F.2d 592, 595 (10th Cir. 1988).

25. Notwithstanding the use of the word "houses" in the Fourth Amendment, persons may have a legitimate expectation of privacy in commercial premises. *See Mancusi v. DeForte*, 392 U.S. 364 (1968); *See v. City of Seattle*, 387 U.S. 541 (1967); *United States v. Chuang*, 897 F.2d 646, 649-50 (2d Cir.), *cert. denied*, —— U.S. ——, 111 S.Ct. 77 (1990); *Leary*, 846 F.2d at 595-96; *see also United States v. Forsythe*, 560 F.2d 1127, 1132 n.5 (3d Cir. 1977).

26. One seeking to challenge a search of a commercial premises bears the burden of establishing a reasonable expectation of privacy. *See Rakas*, 439 U.S. at 130 n.1; *Acosta*, 965 F.2d at 1256 n.9. This entails establishing that the challenger had a subjective expectation of privacy in the searched premises and that the expectation of privacy is "one that society accepts as reasonable." *Chuang*, 897 F.2d at 649.

27. Whether an expectation of privacy is reasonable depends on several factors. Courts have looked at whether the challenger had a property or possessory interest, *id.*, whether the area searched or items seized were knowingly exposed to the public, *California v. Greenwood*, 486 U.S. 35 (1988); *Oliver v. United States*, 466 U.S. 170 (1984), whether a commercial premises is part of a " 'closely regulated' industr[y]," *New York v. Burger*, 482 U.S. 691 (1987), and whether there is a significant

relationship between the area searched and the challenger's work spaces. *Chuang*, 897 F.2d at 649.

28. Jack Conley owned the land and building, as well as Conley Motor Freight and all its materials on the premises. Duffy Conley owned all of the Duffy Vending materials on the premises, and had a possessory interest through those materials. Additionally, Duffy Conley maintained his own desk on the premises, and had daily access to the desks of Sheila Smith and Helen Grosskopf. Sheila Smith, as a full-time secretary to Duffy Vending, occupied the premises all day of every business day as a part of her secretarial and record-keeping duties. Because only five persons regularly worked within the relatively small office area occupied by these two family businesses, there is a significant nexus between each person's work spaces and the premises as a whole.

29. The limited number of persons frequenting the premises on a regular basis, the lack of solicitation of walk-in business, the posting of "no trespassing" signs and Jack Conley's monitoring of persons entering and leaving the premises demonstrates that the premises were not knowingly exposed to the public.

30. Neither the trucking business nor the vending business are "closely regulated industries" in any relevant sense. *Cf. Chuang*, 897 F.2d at 650-51 (no reasonable expectation of privacy in bank records subject to statutorily mandated bi-annual government review).

31. This Court concludes that the subjective expectations of privacy of Jack Conley, Duffy Conley and Shelia Smith ones that society accepts as responsible.

32. Because the record shows no substantial connection, by way of a desk, office, property or regular presence, between William Curtin and the premises of 930 Saw Mill Run Boulevard, the Court concludes that he cannot have a reasonable expectation of privacy sufficient to challenge the search, whatever his subjective expecta-

tions may have been. *Cf. Leary,* 846 F.2d at 595 ("There is no doubt that a corporate officer or employee may assert a reasonable or legitimate expectation of privacy in *his* corporate office") (emphasis added).

II. Probable Cause

A. *Findings of Fact*

33. On September 23, 1988, Detective John Bosetti of the City of Pittsburgh police presented to District Justice Anne Marie Sharding an application and affidavit of probable cause for a search warrant for premises located at 930 Saw Mill Run Boulevard.

34. After reviewing the warrant, a process that took between fifteen and thirty minutes, the District Justice issued the warrant. No other warrant applications were before the District Justice at the time Detective Bosetti presented the warrant application and affidavit.

35. As part of process of issuance, the District Justice administered an oath to Detective Bosetti regarding the truth of the averments in the affidavit.

36. The District Judge read the affidavit, but asked no questions of Detective Bosetti regarding it. Detective Bosetti did not orally supplement the facts in the affidavit.

37. The search warrant described the structure to be searched and authorized the seizure of:

> All video poker machines, keys for machines, accounting records, all revenue records, employee records, purchase orders from distributors and manufactors [sic] of video poker machines, all records showing poker machine locations and any and all paraphernalia indicative of a gambling operation.

38. The affidavit of probable cause section of the Application for Search Warrant consisted in the following:

In June of 1988, affiant began an investigation into a gambling operation, involving video poker machines. During this time frame, affiant and other Dets [Detectives] from the Pittsburgh Police Organized Crime Unit, visited over fifty (50) various locations, throughout the city of Pittsburgh, that contained video poker machines. Dets were able to play, at random, these poker machines and received cash payments/pay-offs for credits they had accumulated, in fortynine [sic] different locations. During this period, Dets observed numerous cash pay-offs to other individuals that were playing poker machines and had aquired [sic] the set amount of credits needed. A detailed accounting of every location is given in each affidavit for search warrant. The City of Pgh, requires a permit for anytype [sic] of video/ mechanical amusement device that is placed inside a particular business and made available to the public. Once the establishment registers, they are given a plaque which must be placed inside the premises so it can be viewed by the public. Dets found that of the 49 locations visited, 42 listed Duffy's Vending Co. as the owner of the video poker machines. Dets then examined the permit application form, from these 42 locations and found that Duffy's Vending Co., lists it's business address as 930 Sawmill Run Blvd., Pgh, Pa. 15220.

On Sep [sic] 15, 1988, affiant observed a Ford pick-up truck transporting a load, of what appeared to be video devices, covered in black plastic. For intelligence purposes, affiant checked the registration plate, Pa# YC-42550 and found it to be registered to Duffy's Vending Co., 930 Sawmill Run Blvd.

The telephone number, 431-6582, is listed as the telephone number of Duffy's Vending Co., as stated on the application for the City of Pgh license per-

mits. Affiant called this number on Sep [sic] 22, 1988 and found it to be answered, "Duffy's Vending." Affiant checked the Bell of Pa yellow pages, both Consumer and Business to Business, but found no listing for Duffy's Vending Co.

On March 16, 1988, John Duffy Conley was found guilty for violating Sec #5513, of the Pa Crimes Code, Gambling Devices. John Duffy Conley is listed as the individual owner of Duffys [sic] Vending Co. This conviction was a result of an investigation, inwhich [sic] affiant participated in, that lead to Conleys [sic] arrest for his involvement in the Slovak Civic Federation of Allegheny County, AKA Slovak Club. In summary, Dets entered the Slovak Club on various times allowing them to play various machines. They were able to obtain a cash pay-off after accumulating the required amount of credits on the video poker machines.

Based on the above information, affiant concludes that the business address of Duffy's Vending Co., is 930 Sawmill Run Blvd., Pittsburgh, Pa. 15220 and request [sic] that this search warrant be issued in an effort gain a better insight into the internal works of this gambling operation. Therefore I request that a search warrant be issued.

39. The section of the Application for Search Warrant that asks for the "Crime which has been or is being committed" reads "Sec #5513 Gambling Devices."

40. The Court notes that Title 18, Pennsylvania Consolidated Statutes Annotated, Section 5513 provides in relevant part:

§ 5513. Gambling devices, gambling, etc.

(a) Offense defined.—A person is guilty of a misdemeanor of the first degree if he:

(1) *intentionally or knowingly* makes, assembles, sets up, maintains, sells, lends, leases,

> gives away, or offers for sale, loan, lease or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards;
>
> (2) allows persons to collect and assemble for the purpose of unlawful gambling at any place under his control;
>
> (3) solicits or invites any person to visit any unlawful gambling place for the purpose of gambling; or
>
> (4) being the owner, tenant, lessee or occupant of any premises, knowingly permits or suffers the same, or any part thereof, to be used for the purpose of unlawful gambling.

18 Pa. Cons. Stat. Ann. § 5513(a) (Purdon 1983) (emphasis added).

41. The Court notes the two ways in which a person can violate Section 5513(a)(1) by means of a video poker machine: by intentionally or knowingly making, assembling, setting up, maintaining, selling, lending, leasing or giving way (1) a devise that is a gambling devise *per se*, or (2) a devise intended to be used for gambling purposes. *See Commonwealth v. Twelve Dodge City Video Poker Mach.*, 517 Pa. 363, 365-67, 537 A.2d 812, 813-14 (1988); *Commonwealth v. Two Elec. Poker Game Mach.*, 502 Pa. 186, 191-92 & nn.1 & 2, 197-98, 465 A.2d 973, 975-76 & n.1 & 2, 979 (1983);[1] *Com-*

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[1] These Pennsylvania Supreme Court cases apply 18 Pa. Cons. Stat. Ann. § 5513(b), which provides:

> (b) Confiscation of gambling devices.—Any gambling device possessed or used in violation of the provisions of subsection (a) of this section shall be seized and forfeited to the Commonwealth. All prvoisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of intoxicating liquor shall apply to seizures and forfeitures under the provisions of this section.

18 Pa. Cons. Stat. Ann. § 5513(b) (Purdon 1983).

monwealth v. Bretz, 289 Pa. Super. 259, 264 n.5, 433 A.2d 55, 58 n.5 (1981) (citing cases); *Commonwealth v. Rose,* 257 Pa. Super. 514, 516-17, 390 A.2d 1356, 1357 (1978).

42. The determination of whether a machine is a gambling device *per se* "will turn on the characteristics of the machine when read against the three elements necessary to gambling: consideration, a result determined by chance rather than skill, and a reward. If the machine displays all three qualities, it will then be 'so intrinsically connected with gambling' as to be a gambling device *per se." Two Elec. Poker Game Mach.,* 502 Pa. at 194, 465 A.2d at 977.

43. The Pennsylvania Supreme Court has determined that video poker machines meet the consideration and chance elements. 502 Pa. at 194-196, 465 A.2d at 977-78. Nonetheless, absent a "knock down" button, which removes accumulated credits, and a meter, which records the number of credits knocked down, the element of reward is lacking, and the machine does not qualify as a gambling device *per se.* 502 Pa. at 197-98, 465 A.2d at 979. That a machine is readily converted, by the addition of a knock down button and meter, to a *per se* gambling device does not make the machine a gambling device *per se. Twelve Dodge City Video Poker Mach.,* 517 Pa. at 367, 537 A.2d at 814.

44. The affidavit does not aver that Duffy Conley or any employee of Duffy Vending Co. was involved in any of the payoffs on video poker machines at the forty-nine locations where Detectives received payoffs ("pay-off locations").

45. The affidavit does not aver that video poker machines were ever on the premises of 930 Saw Mill Run Boulevard.

46. The affidavit does not aver that video poker machines were ever observed entering or leaving the premises.

47. The affidavit does not aver that the video poker machines at the forty-nine pay-off locations were equipped with knock-off buttons or meters.

48. The affidavit does not aver the method in which the video poker machines were used in connection with the illegal pay-offs received and observed at the pay-off locations, *i.e.*, whether the video poker machines were illegal gambling devices *per se* or merely amusement devices operated in illegal gambling activities.

49. The affidavit makes no representation as to when applications were filed for the City of Pittsburgh video amusement device permits that were on display in June of 1988.

50. The City of Pittsburgh video amusement device permits were issued to Duffy Vending Co. in February 1988, seven months prior to the application and affidavit of probable cause for a search warrant.

51. Duffy Vending Co. filed the applications for the video amusement device permits in December 1987, nine months prior to the application and affidavit of probable cause for a search warrant.

52. Other than the averments regarding the City of Pittsburgh video amusement device permits, the affidavit does not aver facts showing that Duffy Vending Co. owned the video poker machines at forty-two of the forty-nine pay-off locations.

53. The affidavit does not aver any facts showing that Duffy Vending Co. maintained the video poker machines at forty-two of the forty-nine pay-off locations.

54. The affidavit makes no representation as to the date of Duffy Conley's activities that lead to his March 16, 1988 conviction.

55. The affidavit does not aver any connection between the Slovak Civic Federation of Allegheny County

and the forty-two pay-off locations using Duffy Vending Co. video poker devices, nor does it set forth the specific capacity in which Duffy Conley was involved with the Slovak Club.

56. In a separate state court prosecution against Duffy Conley, the Court of Common Pleas of Allegheny County, Pennsylvania ("the Suppression Court") suppressed the evidence seized pursuant to the September 23, 1988 warrant for the executing officer's failure to knock and announce their presence.[2]

57. The Suppression Court nonetheless stated that September 23, 1988 warrant was supported by probable cause.[3]

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[2] The Suppression Court's opinon, the pages of which are unnumbered, is included in the record of this case. Pretrial Motions of John F. "Duffy" Conley, Exhibit I (Document No. 377). The Suppression Court's reasoning on the knock and announce issue is found at unnumbered pages 10-15. His conclusion and order on this issue is found at unnumbered page 22, the relevant portion of which reads simply, "The search warrants for the 930 Saw Mill Run and Windgap/Berry Street locations were illegally executed given that police failed to knock and announce their authority and purpose prior to entry. Thus, those warrants are ordered suppressed".

[3] The Suppression Court's reasoning on the probable cause issues in the state court case reads, in its entirety, as follows:

> Defense counsel raised the issue as to the probable cause for issuance of search warrants in this case. To restate the circumstances involved herein, there were 54 warrants issued on the morning of 9/22/88. 47 warrants were issued on the afternoon of 9/22/88. One warrant was issued for 930 Saw Mill Run on 9/23/88. Six warrants were issued on November 9, 1988. Three warrants were issued on 1/27/89.
>
> In light of this Court's earlier ruling suppressing the warrant and evidence seized pursuant thereto, this Court made no finding as to the adequacy of probable cause in the 101 warrants issued on 9/22/88, the issue being moot due to that ruling. As to the other 10 search warrants, this Court finds that after review of the four corners and all the probable cause set forth therein, and in light of the various and numerous

B. *Conclusions of Law*

58. Probable cause for searching a particular place exists in an affidavit when the affidavit sets forth facts constituting a substantial basis for finding a fair probability that first, a crime has been committed, and second, the particular place may contain the fruits, instrumentalities or evidence of the crime committed. *See Illinois v. Gates,* 462 U.S. at 236, 238-39 (1983); *Steagald v. United States,* 451 U.S. 204, 213 (1981); *Zurcher v. Stanford Daily,* 436 U.S. 547, 558 (1978); *Brinegar v. United States,* 338 U.S. 160, 175 (1949); *Dumbra v. United States,* 268 U.S. 435, 441 (1925).

59. Judicial officers reviewing an application for a search warrant are to test the facts set forth in the affidavit of probable cause under a "totality of the circumstances" test in determining whether probable cause to issue a search warrant exists. *Illinois v. Gates,* 462 U.S. at 238-39. Specifically:

> [t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Id. (quoting *Jones v. United States,* 362 U.S. 257, 269 (1960).

60. A court reviewing the issuing magistrate's determination that probable cause exists must exercise great defer-

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decisions of the appellate courts in this matter, that these warrants contained adequate and sufficient probable cause. Defendant counsel's motion to suppress as to these issues was denied. Unnumbered pp. 21-22.

ence in its review. *Gates,* 462 U.S. at 238. A court reviewing the issuing magistrate's determination that probable cause exists should read the affidavit's language in context and as a whole, and not in isolation or in the abstract. *United States v. Johnson,* 690 F.2d 60, 64 (3d Cir. 1982), *cert. denied,* 459 U.S. 1214 (1983). A judicial officer is entitled to draw reasonable inferences about where evidence is likely to be found, based upon the nature of the crime and the evidence sought. *United States v. Malin,* 908 F.2d 163, 166 (7th Cir.), *cert. denied,* —— U.S. ——, 111 S.Ct. 534 (1990).

61. The application and affidavit of probable cause for search warrant may have provided a substantial basis for probable cause to believe that each of forty-nine establishments was using video poker machines in distinct, illegal gambling operations.

62. The application and affidavit of probable cause for search warrant may have provided a substantial basis for probable cause to believe that forty-two of the forty-nine pay-off locations used Duffy Vending video poker machines in distinct, illegal gambling operations.

63. Given the on-going legal relationship among Duffy Vending Co., the City of Pittsburgh and the proprietors of the locations created by the City's permit requirements, the current display in June 1988 of permits listing Duffy Vending Co. as the owner of video poker machines is a substantial basis for concluding that Duffy Vending continued to own the machines on September 23, 1988. Given the relationship of the parties in this regard, the ownership information contained in the permits was not stale, though it was furnished to the City in December 1987.

64. That Duffy Conley was convicted under 18 Pa. Cons. Stat. Ann. § 5513 is not stale information; ten years from now, Conley will have been convicted under Section 5513 on March 16, 1988.

65. Duffy Vending Co.'s ownership of video poker machines in forty-two of forty-nine locations, coupled with Duffy Conley's March 16, 1988 conviction, the specific nature and date of the underlying conduct being unspecified and unconnected to any pay-off location referenced in the affidavit, is not a substantial basis for concluding that the proprietors of the forty-two pay-off locations using Duffy Vending Co. video poker machines were joined in a common purpose amongst themselves or with Duffy Conley or Duffy Vending Co. The affidavit does not contain a substantial basis for believing that the operators of the forty-two pay-off locations were part of a gambling conspiracy. The affidavit's reference to "this gambling operation" is a bare conclusion.

66. There is no basis for concluding that Duffy Conley, Duffy Vending Co. or any employee thereof knew or intended that Duffy Vending Co. video poker machines would be used as illegal gambling devices at any of the 42 locations that paid off on Duffy Vending Co. machines.

67. There is no basis for concluding that the Duffy Vending Co. video poker machines in place at forty-two of the forty-nine pay-off locations were illegal gambling devices *per se*.[4]

68. The District Justice had no substantial basis for concluding that Duffy Conley, Duffy Vending Co. or any of his/its employees were violating Section 5513.

69. The District Justice had no substantial basis for concluding that evidence of a Section 5513 violation could

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[4] On the importance of knock-off switches and meters and gambling machines *per se* to probable cause to search for evidence of gambling activity, see *Commonwealth v. Alewine*, 384 Pa. Super. 283, 287, 558 A.2d 542, 544 (1989) (reversing the trial court's determination that the affidavit failed to indicate an on going activity by finding "that the trial court has failed to perceive the importance of the fact that there was reason to believe that [the defendant] was in possession of a per se gambling device and not just that he was suspected of permitting gambling activity on the premises"), *alloc. denied*, 524 Pa. 624, 574 A.2d 66 (1990).

be found on the premises of 930 Saw Mill Run Boulevard.

70. The application and affidavit for search warrant did not set forth probable cause to search the premises of 930 Saw Mill Run Boulevard.

71. The September 23, 1988 search of 930 Saw Mill Run Boulevard was in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States.

III. The *Leon* Good Faith Exception to the Exclusionary Rule

A. *Discussion*

72. Evidence seized in a search illegal under the Constitution of the United States, conducted by a law-enforcement officer relying in objective good faith upon a judicial officer's issuing of a warrant, is not subjective to the federal exclusionary rule. "[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *United States v. Leon,* 468 U.S. 897, 922 (1984).

73. The Supreme Court in *Leon* delineated four circumstances in which the exclusionary rule is still appropriate, stating:

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his disregard of the truth. . . . The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role . . . ; in such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good

> faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable ." . . . Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. at 923 (citations omitted). The Government bears the burden of establishing the good faith exception to the federal exclusionary rule. *Id.* at 924.

Facially inadequate probable cause.

74. As the Defendants assert that objectively reasonable reliance upon the warrant issued by the District Justice was not possible, the Court is faced with the task of determining whether or not the warrant, which failed to include facts constituting a substantial basis for concluding that there was a fair probability that evidence of a crime could be found on the premises, was so lacking in indicia of probable cause that official reliance on it was entirely unreasonable.

75. The Court has reviewed the law of the Third Circuit, but it has not found any case addressing this particular aspect of the good faith exception to the exclusionary rule.[5] The Court turns, then, in addition to the decisions of the Supreme Court of the United States, to

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[5] Only two Third Circuit cases were found that applied the good faith exception to the exclusionary rule to admit unconstitutionally seized evidence, *United States v. American Investors of Pittsburgh, Inc.*, 879 F.2d 1087 (3d Cir.), *cert. denied*, 493 U.S. 955 (1989); and *United States v. Kepner*, 843 F.2d 755 (3d Cir. 1988). In both cases the court found that the warrant had issued upon probable cause, and applied *Leon* to designations of items to be seized that were overbroad or inadequately particularized.

decisions from other Courts of Appeal for guidance.[6] From its reading of the pertinent case law, the Court has distilled the principles that it will expound and apply in this case.

76. " 'If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.' " *Id.* at 919 (quoting *United States v. Peltier*, 422 U.S. 531, 542 (1975)). Officers are charged with a "reasonable knowl-

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[6] Cases from the different circuits may appear unequally represented in the ensuing discussion. There is a simple reason for this. The approach pursued in deciding *Leon*-type cases determines whether a body of precedent is created distinguishing the "mere" lack of probable cause from affidavits that are objectively unreasonable.

For instance, in *United States v. Angulo-Lopez*, 791 F.2d 1399 (9th Cir. 1986), the Ninth Circuit stated:

> The issue of a "good faith" execution of a warrant that is unsupported by probable cause should not be addressed by the district court until the district judge has determined that probable cause is lacking. If the court determines that the affidavit is sufficient to support a warrant, good faith reliance is irrelevant. Our court would be in a position to review the *Leon* issue only where the affidavit was deficient and the district court has made findings on the good faith issue.

Id. at 1399 n.3. This approach has resulted in a developed body of precedent distinguishing an affidavit lacking a substantial basis from one so lacking indicia of probable cause as to preclude official reliance. In contrast, the Fifth Circuit and the Eighth Circuit, with limited exceptions, address the good faith exception first. *See, e.g., United States v. Satterwhite*, 980 F.2d 317 (5th Cir. 1992); *United States v. Craig*, 861 F.2d 818, 820 (5th Cir. 1988); *United States v. Livesay*, —— F.2d ——, 1993 WL 3415 (8th Cir. 1993). The resulting precedent does not provide similar guidance on the specific issue under discussion; a finding of good faith reliance can be based upon an affidavit that in fact contained probable cause, as well as one that failed yet contained sufficient indicia of probable cause.

edge of what the law prohibits." *Leon*, 468 U.S. at 919-20 n.20.

77. As officials are charged with a reasonable knowledge of what the Constitution forbids, courts have identified rules of law violated by the issuance of a warrant and asked whether a reasonable officer would know that the warrant was voided by the rules of law. *United States v. Skinner*, 972 F.2d 171, 174-75 (7th Cir. 1992); *United States v. Brown*, 951 F.2d 999, 1005-06 (9th Cir. 1991); *United States v. Johns*, 948 F.2d 599, 605-06 (9th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 3046 (1992); *United States v. Weber*, 923 F.2d 1338, 1346 (9th Cir. 1991) (as amended on denial of rehearing and modification); *Malin*, 908 F.2d at 166-67; *United States v. Corral-Corral*, 899 F.2d 927, 932, 937 (10th Cir. 1990); *United States v. Freitas*, 856 F.2d 1425, 1430 (9th Cir. 1988) (*Freitas II*).

78. The Ninth Circuit has recently acknowledged that this approach, which was treated as a guide to the *Leon* inquiry, is akin to the analysis of the "objective legal reasonableness" required for an official's qualified immunity in civil rights cases. *Brown*, 951 F.2d at 1006 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). The Ninth Circuit ruled that, in accordance with the Supreme Court's qualified immunity case *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), the legal rule that is violated must be "clearly established" at the time of the issuance of a warrant before reliance on the warrant can be found to be objectively unreasonable. *Brown*, 951 F.2d at 1006. The Court adopts this approach.

79. At the time the affidavit and application for search warrant was presented to the District Justice in this case, the scope of the criminal prohibitions contained in 18 Pa. C. S. Ann. § 5513(a) were clearly established. *See* paragraphs 40-43, *supra*.

80. It had been long and clearly established that probable cause for searching a particular place consists in facts that would warrant a reasonable person in the belief that first, a crime has been committed, and second, the particular place may contain the fruits, instrumentalities or evidence of the crime committed. *Gates,* 462 U.S. at 236, 238-39; *Steagald,* 451 U.S. at 213; *Zurcher v. Stanford Daily,* 436 U.S. at 558; *Brinegar,* 338 U.S. at 175; *Dumbra,* 268 U.S. at 441; *see also United States v. Ramos,* 923 F.2d 1346, 1351 (9th Cir. 1991).

81. It was clearly established that " '[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be mere ratification of the bare conclusions of others.' " *Leon,* 468 U.S. at 915 (quoting *Gates,* 462 U.S. at 239).

82. The Court will impute knowledge of the foregoing clearly established rules to the reasonably well-trained officer in this case.

83. The Court now examines the type of facts it should consider in determining whether the Government has established the applicability of the *Leon* exception to the federal exclusionary rule.

84. Generally, probable cause is reviewed within the four corners of the affidavit. *See Leon,* 468 U.S. at 913-14; *United States v. Franks,* 438 U.S. 154 (1977) (strictly limiting the circumstances in which a defendant may offer evidence showing the falsity of statements in the affidavit of probable cause).

85. The *Leon* Court, in assessing the objective reasonableness of relying upon the *probable cause* that had been accepted by a magistrate, did not venture beyond the four corners of the affidavit, except to note that the lower courts had been unable to agree on the existence of probable cause in the affidavit in question. *Leon,* 468 U.S. at 926. Nonetheless, in assessing the objective reasonableness of relying upon the *technical sufficiency* of a war-

rant, the Court examined facts limited to events transpiring during the warrant process. *Massachusetts v. Sheppard*, 468 U.S. 981, 989 (1984).[7] The Supreme Court focused its inquiry in this regard on whether "the officers . . . took every step that could reasonably be expected of them." *Id.*

86. In bolstering determinations of objective reasonableness with findings that the officials had done all that could be reasonably expected of them, courts have looked to various factors. These factors include whether the warrant and affidavit were submitted to an attorney for review and approval, *id.*; *Johns*, 948 F.2d at 605; *Freitas II*, 856 F.2d at 1431-32; *United States v. Michaelian*, 803 F.2d 1042, 1046-47 (9th Cir. 1986); *United States v. Fama*, 758 F.2d 834, 837-38 (2d Cir. 1985); whether the magistrate reassured the applying officer that suspect provisions of the warrant or affidavit were appropriate, *Sheppard*, 468 U.S. at 989; *Freitas II*, 856 F.2d at 1431-32; *United States v. Kepner*, 843 F.2d 755, 763-64 & n.7 (3d Cir. 1988); *United States v. Spilotro*, 800 F.2d 959, 968 (9th Cir. 1986); *Fama*, 758 F.2d at 835, 837; whether the magistrate altered the warrant or affidavit in an attempt to conform it to law, *Sheppard*, 468 U.S. at 989; *Corral-Corral*, 899 F.2d at 938-39; whether the

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[7] At least one court has supported objective reasonableness of relying on a magistrate's determination of probable cause with facts known to the official but never communicated to the magistrate. *United States v. Dickerson*, 975 F.2d 1245, 1249-50 (7th Cir. 1992), *petition for cert. filed*, (Dec. 12, 1992). Due to the emphasis given the *magistrates* role in *Gates*, *Leon*, and *Sheppard* and the Supreme Court's reservations about warrantless searches, *see United States v. Santtini*, 963 F.2d 585, 595-96 (3d Cir. 1992), this Court concludes that it may be appropriate to include facts beyond the affidavit of probable cause, but only to the extent that they relate to communications between the affiant and the issuing magistrate or the warrant process. *See United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988); *accord United States v. Ramos*, 923 F.2d 1346, 1352-53 n.14 (9th Cir. 1991); *United States v. Edwards*, 798 F.2d 686, 691-92 (4th Cir. 1986).

affiant produced to the magistrate additional facts in repeated attempts to establish probable cause, *United States v. Edwards,* 798 F.2d 686, 690-92 (4th Cir. 1986); whether the affidavit detailed an extensive investigation, *Leon,* 468 U.S. at 926; *Michaelian,* 803 F.2d at 1047; and whether external time constraints limited the officer's ability to do more to comply with the warrant requirement. *Ramos,* 923 F.2d at 1355 n.18; *Weber,* 923 F.2d at 1346; *Edwards,* 798 F.2d at 690.

RG. Finally, in assessing whether the quantum of factual support in an affidavit of probable cause could have lead an officer to objective reasonable reliance, the Supreme Court has indicated that "evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause . . ." indicates *ex post facto* that enough indicia of probable cause was contained in the affidavit to make the officer's reliance objectively reasonable. *Leon,* 468 U.S. at 926.

B. *Conclusions of Law.*

88. The Government's argument regarding indicia of probaable cause is limited to reliance upon the District Justice's issuance of the warrant and the statement by the Suppression Court that the warrant was supported by probable cause. Government's Brief in Opposition to Defendant's Motion to Suppress (Conley Motor Freight, 9/88) at 29.

89. The Suppression Court made this statement as part of an extensive multi-issue opinion in a single conclusory paragraph that found probable cause for numerous other warrants as well. *See supra,* note 3. This Court does not have the benefit of the Suppression Court's reasoning about the affidavit and warrant in question. Also, as the evidence was suppressed on other grounds, it is clear that the Suppression Court's statement was not necessary to the decision rendered. *Compare supra,* note 2 *and* note 3. A clear peril of dicta is that

such statements may not have been examined as closely as a statement upon which the outcome of a matter turns.

90. Moreover, this Court is the first federal court to address whether evidence from the search in question must be suppressed because the search by state officers violated the defendants' federal constitutional rights. In such matters, this court "must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Elkins v. United States,* 364 U.S. 206, 224 (1960); *see also id.* at 248 (Frankfurter, J. dissenting).

91. This Court concludes that the affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

92. A great part of the affidavit is directed at establishing that 930 Saw Mill Run Boulevard was the business address of Duffy Vending Company. Indeed, the only inference offered by the affiant was, "Based on the above information, affiant concludes that the business address of Duffy's Vending Co., is 930 Sawmill Run Blvd., Pittsburgh, Pa. 15220. . . ." The Court fully accepts this conclusion.

93. The affidavit may well make a sufficient showing of the "crime" element of probable cause.[8] Nonetheless,

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[8] Notwithstanding the clearly established law set forth in paragraphs 58 & 80, the Government would have this Court rule that "[p]robable exists if 'the facts and circumstances known to the officer warrant a prudent man in the officer's shoes in believing that an offense has been committed.' *United States v. Massac,* 867 F.2d 174, 175 (3d Cir. 1989)." Government's Proposed Findings of Fact and Conclusions of Law, at 6. Even the case cited by the Government demonstrates that more is required. *Massac,* 867 F.2d at 176 ("Having determined that the police officer

it is critically deficient—a bare bones affidavit—regarding the connection between the gambling activities described in the affidavit and the premises to be searched. *Compare Ramos,* 923 F.2d at 1353-55; *Malin,* 908 F.2d at 165-67; *Hove,* 848 F.2d at 138-39; *and United States v. Holzman,* 871 F.2d 1496, 1511 (9th Cir. 1989).

94. The affidavit did not set forth any facts indicating the proprietors of the pay-off locations were storing materials at the premises. It did not indicate that Duffy Conley or Duffy Vending Co. or its employees had engaged in gambling conduct, through gambling devices *per se* or knowingly furnishing machines intended to be used for gambling purposes. Duffy Vending's ownership of the machines coupled with Duffy Conley's remote conviction for unspecified conduct in relation to an unconnected establishment are averments "so tenuous that no reasonable police officer could have believed that portion of the warrant was supported by probable cause." *Holzman,* 871 F.2d at 1511-12 n.4.

95. Any inference from the averments of the affidavit that Duffy Conley, Duffy Vending Co. or its employees were part of a wide ranging "gambling operation," or otherwise connected to the gambling activities related in the affidavit, is speculative and not reasonably supported in the averments of the affidavit.[9] In short, the affidavit

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possessed probable cause to make *an* arrest at the railroad station based on a reasonable belief as to contemporaneous illegal narcotics activity, we must next determine whether he had probable cause to arrest *the defendant.*") (emphasis added).

[9] On the issue of whether the affidavit's failure to include a substantial basis for concluding that probable cause exists is such that the affidavit lacked indicia of probable cause sufficient to allow objectively reasonable reliance, the Court received the expert testimony of Stephen F. Tercsak, a former supervisor of detectives for the City of Pittsburgh Police. N.T. July 13, 1992 at 15-74 (Document No. 463). This expert testimony, which the Court finds to be

made a woefully inadequate showing in its attempt to connect evidence of the gambling activities at the pay-off locations to the premises of 930 Saw Mill Run Boulevard.

96. Nowhere in the affidavit is the conclusion drawn that probable cause exists. The affidavit's request "that this search warrant be isused in an effort gain a better insight into the internal works of this gambling operation," while having no bearing on probable cause, does indicate to this Court that the affiant was aware of the paucity of the showing linking the premises to any gambling operation.

97. Moreover, the affiant did not take all steps that were reasonably possible under the circumstances. The affiant did not have an attorney review or approve the application presented to the District Justice. He did not rely upon reassurances from the District Justice that the affidavit as presented was sufficient, and no changes were made to it. While the affidavit indicates an extensive, if not intensive, investigation occurred, the affiant did not relate the critical, lacking details to the District Justice in the process of seeking this warrant. Having been involved in both investigations referenced in the affidavit, he presumably knew the missing details. Finally, the evidence sought in the search warrant was not going to be imminently transported, distributed or consumed. There were no externally imposed time-constraints on the proposed search.

98. The *Leon* good faith exception to the exclusionary rule is inapplicable.

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credible, leads the Court to find as fact hereby that a reasonably well-trained police officer in the City of Pittsburgh would have known that the affidavit did not set forth facts constituting probable cause. The Court, however, notes that, to the extent this issue is not amenable to factual findings, its independently derived legal conclusion, without regard to the expert testimony, is unaffected.

An appropriate order will be entered granting the motion to suppress as to defendants with standing to challenge the search.[10]

LEE, J.

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[10] The Court's resolution of the probable cause and good faith issues is dispositive of the motion to suppress; it does not, therefore, address the various other grounds for suppression raised by the defendants.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Criminal No. 91-178

UNITED STATES OF AMERICA,
JOHN F. "DUFFY" CONLEY, WILLIAM C. CURTIN, SHEILA F. SMITH, JOHN FRANCIS "JACK" CONLEY, THOMAS "BUD" MCGRATH, MARK A. ABBOTT, THOMAS ROSSI, WILLIAM STEINHART, ROBERTA FLEAGLE, ROBIN SPRATT, MONICA C. KAIL, WILLIAM J. REED, JOANNE T. SMITH, KENNETH "RON" GOODWIN, LAWRENCE N. "NEUDY" DEMINO, SR., CHRISTJPHER "CHRIS" KAIL, JOSEPH A. DEVITA, FRANK GAROFALO, THOMAS D. CIOCCO, MICHAEL SUKALY, PHILLIP M. "MIKE" FERRELL, ANESTOS "NAZ" RODITES, and WILLIAM E. RUSIN,

Defendants.

ORDER OF THE COURT

And now this 3rd day of February, 1993, having considered the matters set forth in the Court's Memorandum Opinion of even date, it is hereby ORDERED, ADJUDGED AND DECREED that:

1. Defendant Curtin's Pretrial Motions: Motion to Suppress (Document No. 393) is DENIED IN PART as follows:

> The Motion to Suppress items seized during the September 23, 1988 search of 930 Saw Mill Run Boulevard is DENIED as to Defendant Curtin.

2. The Court having found that Defendant Curtin has no standing, Defendant, William C. Curtin's Motion to Join Pretrial Motions of Co-Defendants (Document No. 433, ¶ 6(a) is DENIED IN PART as follows:

> The Motion to Join, as it relates to motions seeking suppression of the items seized during the September 23, 1988 search of 930 Saw Mill Run Boulevard, is DENIED.

3. The Court having found that Defendant Curtin has no standing, having considered in his favor the briefs-to-be-adopted, Defendant Curtin's Motion to Adopt Briefs and/or Memoranda of Law of Defendants John F. "Duffy" Conley, Sheila Smith and John Francis "Jack" Conley, Regarding 1988 Search of 930 Saw Mill Run Boulevard (Document No. 491) is DENIED.

4. Defendant Sheila Smith's Motion to Join (Document No. 434) is GRANTED IN PART AND DENIED IN PART AS MOOT as follows:

> The Motion to Join is DENIED AS MOOT to the extent that it seeks to join that part of Defendant Curtin's Pretrial Motions: Motion to Suppress (Document No. 393) that is denied in paragraph one of this order;
>
> The Motion to Join is GRANTED to the extent that it seeks to join that part of the Pretrial Motions of John F. "Duffy" Conley: Motion to Suppress Physical Evidence (Document No. 377) that moves to suppress items seized during the September 23, 1988 search of 930 Saw Mill Run Boulevard.

5. The Motion of Defendant John Francis "Jack" Conley to Join in and Adopt the Pre-Trial Motions of Co-Defendants (Document No. 418, ¶ 3) is GRANTED IN PART as follows:

The Motion, as it relates to motions seeking suppression of the items seized during the September 23, 1988 search of 930 Saw Mill Run Boulevard, is GRANTED.

6. The Motion of Defendant John Francis "Jack" Conley to Join in and Adopt the Memorandums of Law Re: 1988 Search of 930 Saw Mill Run Boulevard Filed on Behalf of Co-Defendants John F. "Duffy" Conley and Shelia F. Smith (Document No. 480) is GRANTED.

7. The Motion of Defendant John Francis "Jack" Conley to Joint in and Adopt the Proposed Findings of Fact and Conclusions of Law of Defendants John F. "Duffy" Conley and Sheila F. Smith (Document No. 518) is GRANTED.

8. Defendant John Conley, Jr.'s Motion to Adopt Briefs of Defendants John Conley and Sheila Kelley Smith Regarding 1988 Search of 1988 [sic] Saw Mill Run Boulevard (Document No. 484) is GRANTED.

9. Defendant Jack Conley's Omnibus Pretrial Motion: XI. Motion to Suppress Physical Evidence (Document No. 374), Pretrial Motions of John F. "Duffey" Conley: Motion to Suppress Physical Evidence (Document No. 377), and Defendant Sheila Smith's First Supplemental Motion to Suppress Physical Evidence (930 Saw Mill Run Boulevard) (Document No. 448) are GRANTED IN PART as follows:

All items seized during the September 23, 1988 search of 930 Saw Mill Run Boulevard, as identified in the inventories, are SUPPRESSED;

Ruling on suppression of evidence derivative of the items seized during the September 23, 1988 search of 930 Saw Mill Run Boulevard is

DEFERRED pending evidentiary hearings on the matter.

IT IS FURTHER ORDERED that all motions and parts of motions not expressly ruled upon hereby remain pending.

/s/ Donald J. Lee
DONALD J. LEE
United States District Judge

cc: All Counsel of Record

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93-3095

UNITED STATES OF AMERICA,
Appellant

v.

JOHN F. "DUFFY" CONLEY; WILLIAM C. CURTIN; SHEILA F. SMITH; JOHN FRANCIS "JACK" CONLEY; THOMAS "BUD" MCGRATH; MARK A. ABBOTT; THOMAS ROSSI; WILLIAM STEINHART; ROBERTA FLEAGLE; ROBIN SPRATT; MONICA C. KAIL; WILLIAM J. REED; JOANNE T. SMITH; KENNETH "RON" GOODWIN; LAWRENCE N. "NEUDY" DEMINO, SR.; CHRISTOPHER "CHRIS" KAIL; JOSEPH A. DEVITA; FRANK GAROFALO; THOMAS D. CIOCCO; MICHAEL SUKALY; PHILIP M. "MIKE" FARRELL; AMESTOS "NAZ" RODITES; WILLIAM E. RUSIN

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*; BECKER, STAPLETON, MANSMANN, GREENBURG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and ROSENN *, *Circuit Judges*

The petition for rehearing filed by appellees John F. "Duffy" Conley and Sheila M. Smith having been sub-

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* As to panel rehearing.

mitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: Oct. 14, 1993

APPLICATION FOR SEARCH WARRANT

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY
CITY OF PITTSBURGH
ss:

DET. J. BOSETTI of Pittsburgh Bureau of Police, being duly sworn or affirmed according to law, deposes and says that he has probable cause to believe that certain property is evidence of or the fruit of a contraband or is unlawfully possessed or is otherwise subject to seizure, and is located at particular premises described below.

* * * *

Probable cause belief is based on the following facts and circumstances. Also include probable cause for nighttime searches

In June of 1988, affiant began an investigation into a gambling operation, involving video poker machines. During this time frame, affiant and other Dets from the Pittsburgh Police Organized Crime Unit, visited over fifty (50) various locations, throughout the city of Pittsburgh, that contained video poker machines. Dets were able to play, at random, these poker machines and received cash payments/pay-offs for credits they had accumulated, in fortynine (49) different locations. During this period, Dets observed numerous cash pay-offs to other individuals that were playing poker machines and had aquired the set amount of credits needed. A detailed accounting of every location is given in each affidavit for search warrant. The City of Pgh, requires a permit for any type of video/mechanical amusement device that is placed inside a particular business and made available to the public. Once the establishment registers, they are given a plaque which must be placed inside the premises so it can be viewed by the public. Dets found that of the 49 locations visited, 42 listed Duffy's Vending Co. as the

owner of the video poker machines. Dets then examined the permit application form, from these 42 locations and found that Duffy's Vending Co., lists it's business address as 930 Sawmill Run Blvd., Pgh, Pa. 15220.

On Sep 15, 1988, affiant observed a Ford pick-up truck transporting a load, of what appeared to be video devices, covered in black plastic. For intelligence purposes, affiant checked the registration place, Pa# YC-42550 and found it to be registered to Duffy's Vending Co., 930 Sawmill Run Blvd.

The telephone number, 431-6582, is listed as the telephone number for Duffy's Vending Co., as stated on the application for the City of Pgh licence permits. Affiant called this number on Sep 22, 1988 and found it to be answered "Duffy's Vending." Affiant checked the Bell of Pa yellow pages, both Consumer and Business to Business, but found no listing for Duffy's Vending Co.

On March 16, 1988 John Duffy Conley was found guilty for violating Sec #5513, of the Pa Crimes Code, Gambling Devices. John Duffy Conley is listed as the individual owner of Duffys Vending Co. This conviction was a result of an investigation, in which affidavit participated in, that lead to Conleys arrest for his involvement in the Slovak Civic Federation of Allegheny County, AKA Slovak Club. In summary, Dets entered the Slovak Club on various times allowing them to play various machines. They were able to obtain a cash pay-off after accumulating the required amount of credits on the video poker machines.

Based on the above information, affiant concludes that the business address of Duffy's Vending Co., is 930 Sawmill Run Blvd., Pittsburgh, Pa. 15220 and request that this search warrant be issued in an effort to gain a better insight into the internal works of this gambling operation. Therefore I request that a search warrant be issued.

/s/ John Bosetti
DET J. BOSETTI
Det City of Pittsburgh

Sworn to and subscribed before me
this 23rd day of September, 1988

/s/ A. M. Scharding
District Justice

Supreme Court, U.S.
FILED
FEB 14 1994
CLERK

No. 93-1115

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN F. "DUFFY" CONLEY AND SHEILA F. SMITH
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1115

JOHN F. "DUFFY" CONLEY AND SHEILA F. SMITH
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order suppressing certain documents seized from a commercial building pursuant to a search warrant.

1. Petitioners and others were indicted by a grand jury sitting in the Western District of Pennsylvania. They were charged in a multi-count indictment with conspiracy involving gambling with video poker machines and laundering the proceeds of that business, in violation of 18 U.S.C. 371;[1] engaging in an illegal gam-

[1] On September 3, 1993, the district court dismissed the money laundering aspect of the conspiracy count. An appeal by the government from that ruling is pending in the court of appeals.

bling business, in violation of 18 U.S.C. 1955; interstate travel in aid of gambling, in violation of 18 U.S.C. 1952; and money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i).

Petitioners moved to suppress evidence seized pursuant to a search warrant. The warrant was for a commercial building occupied by a vending company that owned video poker machines that were being used for gambling. The warrant authorized the seizure of poker machines, accounting records, revenue records, employee records, purchase orders, and paraphernalia indicative of a gambling operation. The search resulted in the seizure of documentary evidence. Pet. App. 2a-5a.

The district court suppressed the seized evidence. The court held that the search warrant was not supported by probable cause, because it lacked information connecting the vending company to the illegal use of the video poker machines. The court also refused to apply the good faith exception to the exclusionary rule set forth in *United States* v. *Leon*, 468 U.S. 897 (1984). Pet. App. 16a-42a; *id.* at 43a-48a. The court did not address petitioners' contention that the warrant was overbroad.

The court of appeals reversed. Pet. App. 1a-15a. The court ruled that the district court should not have conducted a *de novo* review of the magistrate's probable cause determination; that the affidavit for the warrant provided a substantial basis for a finding of probable cause for the search of the premises; and that petitioners' overbreadth challenge to the warrant, focusing on the use of the word "all" in the warrant, lacked merit. *Id.* at 5a-14a.

2. Petitioners first contend (Pet. 9-12) that the search warrant was so broad that it violated the particularity requirements of the Fourth Amendment's Warrant Clause. Second, they argue (Pet. 12-14) that the court of

appeals applied an incorrect standard in reviewing the district court's probable cause determination. Finally, petitioners contend (Pet. 14-18) that the good faith exception of *United States* v. *Leon*, *supra*, should not be applied to save the warrant in this case.

Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1994

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[2] Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.